

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of the Disqualification
of the E & L Food Market,
WIC Vendor No. 0630

**RECOMMENDATION
ON MOTION FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Kathleen D. Sheehy on the Motion for Summary Disposition filed by the Minnesota Department of Health (Department) on March 8, 2010. E & L Food Market (Respondent) filed its response on March 16, 2010. The OAH record with respect to the motion closed on March 16, 2010.

Gina D. Jensen, Assistant Attorney General, appeared on behalf of the Department of Health. Adil Albasaad, owner and president of E & L Market, appeared on behalf of the Respondent without counsel.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that:

1. The Department's motion for summary disposition be GRANTED; and
2. The decision by the Minnesota Department of Health to disqualify the Respondent from participating in the WIC program for a period of one year from December 28, 2009, be AFFIRMED.

Dated: April 21, 2010

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record and this report. The Commissioner may adopt, reject or modify this Report and Recommendations.

Under Minn. Stat. § 14.61, the Commissioner may not make a final decision until after the parties have had access to this report for at least 10 days. During that time, the Commissioner must give any party adversely affected by this report an opportunity to file objections to the report and to present argument supporting its position. Parties should contact Dr. Sanne Magnan, Commissioner of the Department of Health, P.O. Box 64975, St. Paul, Minnesota 55164-0975, (651) 201-5000, to learn the procedure for filing exceptions or presenting argument.

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration for doing so. The Commissioner must notify the parties of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve her final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

The Respondent is a convenience store located at 1122 Lowry Avenue North in Minneapolis. Since July 2001, the Respondent has been a retail food vendor authorized to redeem vouchers for the Women Infant Children (WIC) program managed by the Department of Health. During all relevant time periods the Respondent was also a vendor authorized to accept food stamps issued by the Supplemental Nutrition Assistance Program (SNAP) managed by the U.S. Department of Agriculture.

In September 2009, the U.S.D.A. Food and Nutrition Service imposed a civil penalty on the Respondent in the amount of \$9,156, in lieu of disqualifying the Respondent for a one-year period, based on the Respondent's violation of regulations pertaining to the SNAP program. The Department of Health subsequently terminated the Respondent's WIC vendor agreement and disqualified the Respondent as a WIC vendor for one year, based on the SNAP penalty. The Respondent has appealed these actions taken by the Department of Health.

The WIC program is a federal program intended to supply nutritious food to pregnant and nursing women and to infants, when they otherwise could not afford to purchase that food. The program is federally funded, managed by the State, and administered by approximately 70 local WIC agencies.¹ Vouchers for specific food items are issued to recipients of benefits. These vouchers are redeemed in authorized vendor's stores, where the vouchers are used in the same manner as cash, with the vendor writing in the cost of the listed items purchased and accepting the voucher as full payment for the listed items. The vendor then redeems the voucher for the amount

¹ Affidavit of Rick Chiat ¶ 2.

written on the voucher. Only authorized vendors may submit vouchers to the WIC program for payment.²

In order to become a WIC vendor, a store must apply to the WIC Program. If the store meets program requirements, store personnel must receive training and the owner must sign a retail food vendor agreement, which describes the terms of the vendor's participation in the program, identifies the applicable federal and state regulations and enumerates the penalties for failing to comply with program requirements.³

On September 25, 2009, the USDA Food and Nutrition Service sent a letter informing the Respondent that it had violated federal SNAP regulations when it accepted SNAP benefits for payment on credit accounts.⁴ The determination letter imposed a civil money penalty (CMP) for hardship on the Respondent in lieu of the one year period of disqualification called for under the SNAP regulations.⁵ The USDA Food and Nutrition Service did not disqualify the Respondent from SNAP because it determined that disqualification would cause hardship to households receiving SNAP benefits.⁶

By letter dated November 25, 2009, the Department notified the Respondent that it was terminating the store's WIC Vendor Agreement and disqualifying the store from participating in the WIC Program for a period one year, beginning December 28, 2009. The Department based the disqualification on Minnesota Rule 4617.0084, subp. 10(B), which requires that a store receiving a CMP in lieu of disqualification from SNAP be disqualified from the WIC Program for the amount of time the store would have been disqualified from SNAP absent the hardship determination. The Respondent appealed the Department's disqualification decision on December 8, 2009, and this contested case proceeding ensued. After a prehearing conference on February 17, 2010, the Department moved for summary disposition, asserting that there were no facts in dispute and that the Department was entitled to resolution of this matter in its favor as a matter of law.

Procedural Posture

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.⁷ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.⁸ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁹

² Chiat Aff. at ¶ 3 and 4.

³ Chiat Aff. at ¶ 4.

⁴ Ex. B.

⁵ *Id.*

⁶ *Id.*

⁷ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

⁸ See Minn. R. 1400.6600.

⁹ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.¹⁰ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹¹ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹²

When considering a motion for summary judgment, the ALJ must view the facts in the light most favorable to the non-moving party.¹³ All doubts and factual inferences must be resolved against the moving party.¹⁴ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹⁵

Undisputed Facts

Respondent operates a retail food store located at 1122 Lowry Avenue North in Minneapolis, Minnesota.¹⁶ The Department and Respondent entered into retail food vendor agreements beginning in July of 2001.¹⁷ Their most recent retail food vendor agreement was effective April 1, 2008, through March 31, 2011.¹⁸ The Respondent has no record of ever having violated a WIC program rule.¹⁹

In August 2009, the USDA Food and Nutrition Service notified the Respondent that it violated a number of regulations pertaining to the SNAP program. Initially, the program alleged that the Respondent should be fined more than \$45,000 and be disqualified from the program. The Respondent met with program officials and provided information satisfactorily responding to a number of these allegations.²⁰ Ultimately, in September 2009, the federal program concluded that the Respondent had violated federal regulations by accepting SNAP benefits for payment on credit accounts, and it imposed a hardship CMP in the amount of \$9,156 in lieu of any disqualification, because it determined that disqualifying the Respondent would impose a hardship on households receiving SNAP benefits.²¹

¹⁰ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹¹ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

¹² *Carlisle*, 437 N.W.2d at 715 (citing, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹³ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹⁴ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

¹⁶ Chiat Aff. ¶ 5.

¹⁷ *Id.* Ex. A, Retail Food Vendor Agreement.

¹⁸ *Id.*

¹⁹ Respondent's Letter Opposing Summary Disposition.

²⁰ *Id.*

²¹ See Chiat Aff. Ex. B.

On or about October 27, 2009, a USDA Food and Nutrition Service employee forwarded a copy of Respondent's determination letter to the Department.²² The Department was notified that the SNAP decision was final.²³ By letter dated November 25, 2009, the Department notified Respondent that, based on the CMP imposed by the USDA Food and Nutrition Service's SNAP and pursuant to Minn. R. 4617.0084, subp. 10(B), the store's WIC Vendor Agreement would be terminated and Respondent would be disqualified from the WIC program for a period of one year, beginning December 28, 2009.²⁴

Minn. R. 4617.0084, subp. 10(B), provides that:

If the [federal] food stamp or food support program assesses a vendor a civil money penalty for hardship instead of disqualifying the vendor from the food stamp or food support program, the [state] commissioner shall disqualify the vendor from the WIC program for the amount of time the vendor would have been disqualified from the food stamp or food support program absent the hardship determination, except as provided in subpart 15.

Subpart 15 of Minn. R. 4617.0084 requires that prior to disqualification, the Commissioner determine whether disqualification of the vendor will result in inadequate participant access. Respondent is located in Hennepin County, a Tier 1 county.²⁵ In Tier 1 counties, disqualification would result in inadequate participant access if:

as of the date of the notice of disqualification or civil money penalty:

(a) the next closest retail food vendor is more than one mile by public road from the vendor, not including roads on which pedestrians are prohibited; and

(b) there is no bus stop or other public transportation within one-half mile by public road from the vendor, not including roads on which pedestrians are prohibited.²⁶

The Retail Food Vendor Agreement between the Department and the Respondent similarly identifies the possible sanctions for noncompliance with WIC program requirements. Section XI(1)(2) of the Agreement states:

If the food stamp program assesses the Vendor a civil money penalty for hardship instead of disqualifying the Vendor from the food stamp program,

²² Chiat Aff. ¶ 6.

²³ *Id.*

²⁴ Chiat Aff. ¶ 7; Ex. C.

²⁵ Minn. R. 4617.0002, subp. 40(f) (2009). A "Tier 1 county" is a "Minnesota county in which the total population is 250,000 or more according to the most recent State of Minnesota or United States census or estimated update as compiled by the state demographer."

²⁶ Minn. R. 4617.0084, subp. 15(B)(2).

the commissioner shall disqualify the Vendor from the WIC program for the amount of time the Vendor would have been disqualified from the food stamp program absent the hardship determination, except as provided in XI(O) of this Agreement.

Like Minn. R. 4617.0084, Section XI(O) provides that before a vendor is disqualified, the commissioner shall determine whether disqualification will result in inadequate participant access.²⁷ Respondent's owner, Adil Albasaad, signed the Agreement certifying that he had read it and that he would comply with all of its provisions.²⁸

Respondent is located at 1122 Lowry Avenue North in Minneapolis. The next closest WIC retail vendor by public road is So Low Grocery Outlet, located at 3111 Emerson Avenue North in Minneapolis, approximately 0.1 miles away.²⁹ Two other retail vendors, Stars Food Market and Get Happy Oriental Food, are located within 0.3 miles of the Respondent.³⁰ Five other retail vendors are located within one mile of the Respondent.³¹ A bus stop is located at within one-half mile by public road from Respondent. Metro Transit's website reflects that the bus stop is located at Lowry Avenue North and Emerson Avenue North, approximately 0.06 miles by public road from Respondent.³²

Analysis

Minnesota rules provide that a vendor shall be disqualified if the vendor is assessed a CMP by the USDA for SNAP violation(s).³³ The only exception to this disqualification is if the Commissioner finds the disqualification will result in inadequate participant access. Respondent argues that its disqualification from the WIC Program will result in hardship to his employees and his customers, many of whom are elderly and disabled, and who will now be forced to carry their groceries additional blocks to their homes. Respondent also argues that a more appropriate disqualification time period would be three or six months as provided by Minn. Rule 4617.0084, subps. 13 and 13a, which contain the penalties for other violations of specific WIC program rules. The Respondent contends that the violations it was cited for by the USDA are more akin to failing to accept a coupon and failing to discount the price of a food item, as opposed to the more serious rule violations that would merit a one-year disqualification from the WIC program.³⁴ The Respondent also points out that, unlike the federal regulations,

²⁷ See Ex. A at 18.

²⁸ *Id.* at 24; Chiat Aff. at ¶ 5.

²⁹ Chiatt Aff. at ¶ 8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Minn. R. 4617.0084, subp. 10 B (2009).

³⁴ See, e.g., Minn. R. 4617.0084, subp. 11 B (providing false or misleading information on documents submitted to the commissioner is a one-year disqualification).

there is nothing in the state regulations that would permit the Department to impose a monetary penalty on the Respondent in lieu of a disqualification.³⁵

The Department maintains that it has no discretion in this matter and is required, under Minn. R. 4617.0084, subp. 10(B), to disqualify Respondent from the WIC program for a period of one year, absent a determination that the disqualification will result in “inadequate participant access.” Pursuant to subpart 15 of Minn. R. 4617.0084, the Respondent’s disqualification will not result in inadequate participant access because there is another retail food vendor within .1 of a mile of Respondent’s location and a bus stop within .6 of a mile.

The Administrative Law Judge concludes that there are no genuine issues of material fact in this matter and that the Department’s actions should be affirmed as a matter of law. The SNAP CMP was imposed in lieu of a one-year disqualification. The WIC rules require disqualification “for the amount of time the vendor would have been disqualified from the SNAP or food support program absent the hardship determination.” Because Respondent’s disqualification will not result in inadequate participant access as the term is defined under the rules, the Department is required to disqualify the Respondent for the one-year period. This is a harsh result in these circumstances, but it is compelled by the rules. The Administrative Law Judge recommends that the Commissioner grant the Department’s motion for summary disposition and affirm the one year disqualification of the Respondent from the WIC program.

K.D.S.

³⁵ Minn. R. 4617.0084, subp. 15 F (2009).